

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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**Appeal Nos. 2015AP1233-CR
2015AP2260-CR**

**Cir. Ct. Nos. 2013CF3474
2013CF4393**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE C. JOHNSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Reilly, C.J., Gundrum and Hagedorn, JJ.

¶1 REILLY, P.J. Jimmie C. Johnson appeals from judgments of conviction for two counts of possession with intent to deliver and bail jumping and an order denying his postconviction motion. Johnson argues that police did not have probable cause to stop his vehicle and arrest him. We conclude that based on a citizen informant's tip and subsequent police investigation, there was probable cause to arrest Johnson for possession of heroin. We affirm.

BACKGROUND

¶2 On June 13, 2013, J.T., a social worker, came to the West Allis police department to report a crime. J.T. brought a purple "Crown Royal" bag with her, containing what was later determined to be heroin. J.T. found the bag in the parking lot of the West Allis Chuck E. Cheese where she was conducting a client visit. J.T. explained that when she exited her vehicle in the parking lot, she noticed the bag sitting on the ground right outside the driver's-side door of the Chevrolet Tahoe that was parked next to her, and she believed based on the position of the bag that it had fallen out of the Tahoe. Upon inspection, J.T. found sixty-nine aluminum foil folds in the bag, and she suspected it was drugs. J.T. took a picture of the Tahoe's license plate, which she later emailed to police, and went inside Chuck E. Cheese.

¶3 J.T. continued to watch the Tahoe through the window of Chuck E. Cheese, and she saw a black male, with a light to medium complexion, wearing a black t-shirt and black shorts, walk from Pet World, a neighboring business, and get into the Tahoe. She described the man, later revealed to be Johnson, as between 5'8" and 5'9," approximately 200 pounds, and appearing to be in his twenties.

¶4 J.T. told officers that she continued to watch Johnson as he began to drive away, and she watched him make “an abrupt stop” before he “turned back in the parking lot and then started circling around the parking lot which she described as appear[ing] to be looking for something.” After driving around, Johnson “got out and walked around, looked on the ground, again, like [he] lost something, then eventually went back in the vehicle and left the area.”

¶5 Based on the information provided to the police by J.T., Detective Nick Stachula, with the West Allis police department, requested video surveillance footage from Pet World for the approximate time period of the incident. Officer Stachula was able to identify an individual on the video matching the description of Johnson given by J.T. According to the video, while in the store, Johnson proceeded “to the fish tank display area, looked around the garbage can and underneath it. He was looking—as if [Johnson] was looking for something and then moments later exited back out the door without stopping to purchase anything, without really looking at any items to buy.”

¶6 Officer Stachula also ran the license plate of the Tahoe through the Department of Transportation database, which indicated that the Tahoe was registered to a female owner at a North 48th Street address in Milwaukee. He conducted surveillance on that address but was unsuccessful in locating either the Tahoe or Johnson. Officer Stachula then emailed other jurisdictions through an “investigative website” to inquire whether other officers had made contact with the vehicle. An officer in Milwaukee responded that the vehicle received a parking citation at an address on North 52nd Street. Officer Stachula staked out that location and observed the Tahoe parked outside that address.

¶7 While conducting surveillance on June 19, 2013, six days after J.T.'s initial report, Stachula and another officer witnessed Johnson leave the residence and drive away in the Tahoe. The officers followed Johnson until he parked and walked toward several businesses, where the officers lost track of him. They were, however, able to confirm that Johnson matched the description given by J.T. and was the individual identified in the Pet World video. Johnson returned to his vehicle no more than two minutes after he arrived, and returned to the North 52nd Street address. Officer Stachula called Milwaukee police for a marked squad car to conduct a stop. Five to ten minutes later, Johnson reemerged from the residence and drove to a nearby gas station, where a Milwaukee police officer stopped Johnson.

¶8 Johnson was ordered out of the vehicle and handcuffed. He informed the police that there was a gun and a knife inside the Tahoe but that "he was not responsible for anything else" in the vehicle. A K-9 unit alerted to the presence of drugs by the driver's side door, and the officers secured a search warrant. The search revealed 14.26 grams of heroin in the center console of the Tahoe.

¶9 Johnson was charged with two counts of possessing heroin with intent to deliver in Milwaukee County case No. 2013CF3474. The State initially charged Johnson with only one count of possession with intent to deliver for the heroin that was recovered from the vehicle, but later filed an amended information to include the second charge for the drugs recovered in the Chuck E. Cheese parking lot. While out on bond, Johnson committed a separate offense, and the State charged him with possession with intent to deliver, felony bail jumping, and obstructing an officer in Milwaukee County case No. 2013CF4393.

¶10 Johnson moved to suppress the heroin seized from his vehicle on the grounds that the police did not have probable cause to stop and arrest Johnson. Johnson argued that the subsequent search was the fruit of an improper arrest. The circuit court denied Johnson's motion, finding probable cause existed to stop and arrest Johnson based on J.T.'s tip and Officer Stachula's follow up investigation. Johnson pled guilty under a global plea agreement. Johnson appeals the circuit court's denial of his motion to suppress, and requests that this court vacate his convictions.

DISCUSSION

¶11 Johnson's sole argument is that police did not have probable cause to arrest him on June 19, 2013. We review an order denying a motion to suppress as a question of constitutional fact, which is a two-step inquiry. *State v. Robinson*, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463. We first review the circuit court's findings of fact for an erroneous exercise of discretion, then we apply constitutional principles to those facts de novo. *Id.*

¶12 In support of its determination that there was probable cause to arrest Johnson, the circuit court made findings of fact as to the details discussed above. The circuit court found that Officer Stachula's testimony regarding J.T.'s tip and his subsequent investigation was "undisputed" and "credible." The circuit court's findings of fact are not clearly erroneous as the findings are supported by the record.

¶13 We next independently address whether the facts in the record support probable cause. We are protected against unreasonable searches and seizures by the United States Constitution and the Wisconsin Constitution. U.S.

CONST. amend IV; WIS. CONST. art. 1, § 11. An arrest is a seizure under the Fourth Amendment. *See California v. Hodari D.*, 499 U.S. 621, 624 (1991). Johnson was arrested without a warrant; thus, his arrest must be based on probable cause. *See State v. Blatterman*, 2015 WI 46, ¶34, 362 Wis. 2d 138, 864 N.W.2d 26 (“Warrantless arrests are unlawful unless they are supported by probable cause.”). “In determining whether probable cause exists, we examine the totality of the circumstances and consider whether the police officer had ‘facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant ... committed or [was] in the process of committing an offense.’” *Id.*, ¶35 (quoting *State v. Richardson*, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990) (alteration in original)). This is a fact-specific inquiry, depending entirely on the facts involved in a particular case. *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶14 Probable cause to arrest does not involve the same “quantum of evidence which might later support a conviction.” *Ball v. State*, 57 Wis. 2d 653, 659, 205 N.W.2d 353 (1973); *see also Locke v. United States*, 11 U.S. 339, 348 (1813) (“[T]he term ‘probable cause,’ according to its usual acceptation, means less than evidence which would justify condemnation It imports a seizure made under circumstances which warrant suspicion.”). Probable cause “deals with probabilities and need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.” *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985).

¶15 Where an informant reports criminal activity, the proper approach to determine probable cause is to evaluate the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The import of *Gates* is that whether officers had probable cause to arrest is to be considered in light of all information available to them at the time of the arrest, including the tip itself together with knowledge of the informant, any corroboration of the tip, and any other information uncovered by or related to the arresting officer.

Edwards v. Cabrera, 58 F.3d 290, 293 (7th Cir. 1995). Our supreme court has acknowledged a striking difference between a “citizen informer[,]” as J.T. was in this case, and a “police informer,” who usually provides information “for some concession, payment, or simply out of revenge against the subject.” *Paszek*, 50 Wis. 2d at 630-31. A citizen informant is seen by the courts as a more reliable witness to criminal activity because he or she “acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession in exchange for his information.” *Id.* at 630.

¶16 Accordingly, our courts have applied “a relaxed test of reliability, that ‘shifts from a question of personal reliability to “observational” reliability.’” *State v. Williams*, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106 (citations omitted). We judge the reliability of a citizen informant by “the nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation” “some of the details of the information reported.” *Paszek*, 50 Wis. 2d at 631-32.

¶17 J.T.’s tip falls squarely within the scope of a citizen informant. J.T. had no personal interest in Johnson’s arrest; J.T. was merely a concerned citizen. J.T. was not an anonymous informant as she was known to the police after first calling the police department and giving her name, and then coming in person to the police station with the recovered bag of drugs. See *State v. Sisk*, 2001 WI App 182, ¶¶8-9, 247 Wis. 2d 443, 634 N.W.2d 877 (noting that a caller who provides

his or her name is not anonymous and “a court can consider this factor in weighing the reliability of the tip”). Bringing the bag of drugs to the police demonstrated proof of her first-hand knowledge of the events she conveyed to police.

¶18 The reliability of J.T.’s tip was strengthened by good police work, which corroborated the details of the information provided by J.T. *Williams*, 241 Wis. 2d 631, ¶39-40. J.T. gave the police a description of Johnson, including the clothes he was wearing, his race, and his approximate height and weight. J.T. indicated that Johnson had come from the direction of the Pet World when she watched him return to his vehicle, and the officers were able to verify that an individual matching the description was in Pet World during that time. J.T. also provided a photograph of the vehicle and the license plate of the vehicle the drugs were adjacent to, and officers were later able to verify that the same person identified by J.T. and corroborated by video surveillance was driving that vehicle. We accordingly conclude that J.T. was a reliable citizen informant.

¶19 With the reliability of J.T. verified, we turn to the substance of her report. J.T. recovered a purple “Crown Royal” bag full of heroin from a parking lot. The bag was found lying beside the driver’s-side door of the Tahoe, which J.T. indicated appeared to have “[fallen] out of that car.” After observing the Tahoe, J.T. saw Johnson return to the vehicle, go to leave the parking lot only to stop abruptly, “circle[] around the parking lot,” and then get “out and walk[] around, looked on the ground ... like [he] lost something, then eventually went back in the vehicle and left the area.” Officer Stachula testified at the motion hearing that based on his conversation with J.T. and the location of the bag, as well as “the actions of the driver after leaving that area and returning and looking for it, I also agreed that it would appear that that bag probably came from that

vehicle and fell from it.” Police later identified Johnson on video surveillance at Pet World where he again appeared to be looking for something in the store, rather than looking to purchase something. *See Gates*, 462 U.S. at 243 n.13 (noting that as probable cause only requires a probability, it was reasonable that “seemingly innocent activity became suspicious in light of the initial tip”) (citation omitted).

¶20 Through first-rate police work, Officer Stachula was able to locate Johnson, and he witnessed Johnson drive to an area with several small businesses and stay for “[a] minute or two at most” before leaving. Officer Stachula testified that he had seen similar behavior “[h]undreds of times” when conducting surveillance on individuals suspected of or known for selling narcotics: “[T]hese street deals or quick meets are very short, brief meetings where the idea is you have something illegal on you, you want to make that transaction as quick as possible and then move back to your stash house or locations where you’re keeping your narcotics.” *See United States v. Cortez*, 449 U.S. 411, 418 (1981) (“[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”); *United States v. Ortiz*, 422 U.S. 891, 897 (1975) (“[O]fficers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience.”). The officers’ follow-up investigation was sufficient to corroborate and supplement the information provided by J.T. Based on the totality of the circumstances, we conclude that a reasonable officer would believe that Johnson’s involvement in the criminal activity of possession of a controlled substance outside of Chuck E. Cheese on June 13, 2013, was more than a possibility; it was a probability, sufficient to establish probable cause.

¶21 Johnson argues that no probable cause existed in this case as there was no evidence that he ever possessed heroin since J.T. never saw him with the purple “Crown Royal” bag, J.T. did not see the bag fall out of his vehicle, and Officer Stachula never saw him make a drug transaction. Direct evidence that Johnson possessed heroin was not necessary to establish probable cause to arrest. As our supreme court stated in *State v. Secrist*, 224 Wis. 2d 201, 215, 589 N.W.2d 387 (1999), “probable cause eschews technicality and legalisms in favor of a ‘flexible, common-sense measure of the plausibility of particular conclusions about human behavior.’” (citations omitted). In *Secrist*, the court found that the mere odor of marijuana, where it could be linked to a person, established probable cause to arrest as “common sense” dictates that “a crime has probably been committed.” *Id.* at 217-18. Here, we have a bag of drugs, not simply an odor, and police were able to sufficiently link Johnson to the bag through J.T.’s report as well as independent investigation.

CONCLUSION

¶22 We hold that under the totality of the circumstances, the police had probable cause to arrest Johnson based on J.T.’s tip, the bag of drugs recovered from beside Johnson’s vehicle, and the independent police investigation. We therefore affirm the decision of the circuit court.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

